

IN THE SUPERIOR COURT of the STATE OF WASHINGTON
COUNTY of KING

State of Washington,

Plaintiff,

vs.

Joseph T. McEnroe and
Michele K. Anderson,

Defendants.

No. 07-1-08716-4 SEA ☒

No. 07-1-08717-2 SEA ☐

**Order Denying Motion for
Reconsideration,
Denying Motion to Dismiss, and
Setting Date of February 17, 2014, by
Which to Move to Amend Information**

On January 2, 2014, this Court entered an order based on the recent decision of Alleyne v. United States, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). Decided by the United States Supreme Court in June 2013, Alleyne expanded the analysis and application of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000), and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, (2002).

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Justice Thomas, writing for the majority in Alleyne with respect to Part III B of the decision, announced the decision of the Court:

“When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.”

Alleyne at 2162.

The Alleyne Court instructed that whenever the penalty prescribed for a crime is increased beyond the range provided for that crime by the finding of an additional aggravating factor, that factor becomes an element. Further, that element – along with the elements of the original, core crime – “together constitute a new, aggravated crime, each element of which must be submitted to the jury.” Alleyne at 2161.

The Court emphasized: “The essential point is that the aggravating fact produced a higher range [than that affixed to the core crime], which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime.” Alleyne at 2162-63.

Accordingly, in its order of January 2, 2014, this Court held that, per Alleyne v. United States, the fact of not sufficient mitigating circumstances under the statutory scheme of RCW 10.95 is “an element of the crime for which death is the mandatory punishment.”

The State has moved the Court to reconsider that order. Alternatively, the State also requests – impliedly in its Memorandum and explicitly at a hearing convened at the State’s request on January 9, 2014 – that this Court declare that Mr. McEnroe received constitutionally adequate notice of the element of insufficient mitigation when the State served on him its Notice of Special Sentencing Proceeding.

For his part, Defendant Joseph McEnroe has requested that this Court accept his tender of a plea of guilty to the core crime of Aggravated Murder in the First Degree, and be sentenced to the only penalty authorized by the statute upon conviction of that offense: life in prison without release or parole. Mr. McEnroe also asks the Court to dismiss the State's Notice of Special Sentencing Proceeding, thereby precluding the possibility of a death sentence. Defendant Michele Anderson has joined in that motion.

The Court has considered full briefing on the motions, along with oral argument, and hereby denies both the motion for reconsideration and the motion to dismiss the notice of special sentencing proceeding.

Additionally, for the reasons below and per State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004), the Court holds that the element of insufficient mitigation must be charged in the Information, and sets the date of Monday, February 17, 2014, by which the State may move this Court to amend.

If the State does not elect to move to amend by that date, the Court will entertain Defendant's motion to accept his change of plea.

I. The State's Motion for Reconsideration

Under Alleyne's expanded elements analysis summarized above, RCW 10.95 establishes the core, statutory crime of Aggravated Murder in the First Degree. RCW 10.95.020. The statutory sentence for that crime upon a verdict of guilty is life in prison without possibility of release. RCW 10.95.030(1). Under the statute, a jury's finding of the additional aggravating factor of not sufficient mitigating circumstances increases the penalty to a mandatory sentence of death. RCW 10.95.030(2).

Per Alleyne, therefore, as a result of the way insufficient mitigation functions in the statutory scheme it is an element of a crime that is “distinct and separate” from the core crime of first degree aggravated murder. Consequently, insufficient mitigation “necessarily forms a constituent part of a new offense,” the corresponding penalty for which is the death penalty. Alleyne, supra. This is the understanding of Alleyne v. U.S. on which the Court’s order of January 2, 2014, was based.¹

The State asserts that this Court’s order is founded on “legal errors.” The State contends that Alleyne concerns only a defendant’s right to a jury trial and nothing more. Alternatively, the State suggests, to the extent that Alleyne might have held that a particular type of fact is an element, it is an element “for Sixth Amendment purposes” and not for charging purposes. Consequently, the State argues, Alleyne is a case only about a defendant’s right to a trial by jury, and under the statutory scheme of RCW 10.95 a jury already decides the fact of insufficient mitigation. Alleyne, therefore, does not apply here. State’s Brief at 3 and passim.²

The State also argues that our State Supreme Court has already concluded that insufficient mitigation is not an element (citing State v. Yates, 161 Wn2d 714, 168 P.3d 359 (2007)). To the extent that Alleyne v. U.S. might require a different conclusion, the State asserts, this Court cannot follow an intervening decision of the United States Supreme Court “that does not directly address the issue at hand” (citing State v. Gore, 101 Wn.2d 481, 681 P.2d 227 (1984)). State’s Brief at 4.³

¹ One could argue that Alleyne’s analysis applies here *a fortiori* because the finding of insufficient mitigation does not establish merely a new, higher *range* of sentences within which a sentencing judge may still exercise discretion, as in Alleyne. Rather, under RCW 10.95 a verdict of guilty on the statutory crime and a finding of the additional aggravating factor establish an entirely new, mandatory sentence: the penalty of death.

² The State has interspersed its arguments (1) in support of its motion for reconsideration, (2) in opposition to Defendant’s motion to dismiss, and (3) in support of the adequacy of notice throughout a single memorandum dated January 14, 2014 (hereinafter referred to as Memorandum or State’s Brief). The Court has endeavored where possible to apply the arguments to the form of relief they best support.

³ The Court addresses this assertion in its discussion below regarding State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004).

In its motion for reconsideration the State attempts to prove too much. This Court merely held that under Alleyne's expanded analysis the absence of sufficient mitigation is an element of the crime for which death is the mandatory punishment. The ruling was deliberately narrow and circumscribed. At a subsequent hearing, this Court orally reconfirmed the narrowness of its ruling. The Court stated unequivocally that the consequences that might flow from that determination would remain unresolved pending additional briefing.

The State's Motion for Reconsideration fails to demonstrate that this Court's narrow ruling of January 2, 2014, was erroneous. Accordingly, the motion is denied.

II. Subsequent Briefing

Following entry of the Court's order of January 2, 2014, the parties submitted the following documents in support of their respective requests for relief:

1. Defendant's McEnroe's Motion to Dismiss Notice of Intention to Seek Death Penalty Because Crime Charged Is Not Punishable by Death
2. Defendant Anderson's Statement of Joinder
3. Defendant McEnroe's Change of Plea to Non-Capital Aggravated Murder, as Charged in the Information, Punishable by a Mandatory Sentence of Life in Prison Without Release
4. Statement of Defendant on Plea of Guilty to Felony Non-Sex Offense
5. Defendant McEnroe's Memorandum in Support of Court Accepting His Plea of Guilty as Charged, to Non-Capital Aggravated Murder, as Charged in the Information, Punishable by Mandatory Sentence of Life in Prison Without Release

6. State's Objection to Defendant McEnroe's Claim that He Has a "Right" to Plead Guilty to "Non-Capital Aggravated Murder" and Thereby Avoid the Death Penalty
7. State's Motion for Reconsideration of the Court's "Order Granting in Part Defendant McEnroe's Motion Based on Alleyne v. United States
8. State's Memorandum in Support of Motion for Reconsideration of Court's Order Based on Alleyne v. United States and Response to McEnroe's Latest "Motion to Dismiss Notice of Intention to Seek Death Penalty."
9. Defendant McEnroe's Reply to State's Objection to Change of Plea
10. Defendant McEnroe's Limited Reply to State's Response to Motion to Dismiss Notice of Intention to Seek Death Penalty Because Crime Charged Is Not Punishable by Death
11. Defendant McEnroe's Response to State's Motion to Reconsider Court's Order of January 2, 2014
12. State's Reply to Defendants' Response to Motion for Reconsideration of Court's Order Based on Alleyne v. United States

The Court addresses first the State's request that this Court declare that Mr. McEnroe has received adequate notice of insufficient mitigation.

A. Adequacy of Notice

At a hearing convened on January 9, 2014, and again impliedly in its Memorandum, the State requested that the Court declare the State's Notice of Special Sentencing Proceeding to be constitutionally adequate notice of the element of insufficient mitigation, thereby relieving the State from having to charge that element in the Information.

In support of its request, the State maintains primarily that a functional distinction exists between elements that require a jury determination under the Sixth Amendment, as addressed by Alleyne, and elements that require notice to a defendant via the charging document. The State cautions that Alleyne did not involve a “charging document” issue, and therefore does not support any application of its elements analysis to the issue of adequate notice.

The State concludes that even if insufficient mitigation is an element, Alleyne does not require that it be charged in the Information. The legislature has provided a separate, statutory mechanism for giving notice of insufficient mitigation. That mechanism is the Notice of Special Sentencing Proceeding. The State is required to conform its practice to that statute and the State did so here, thereby giving to Mr. McEnroe all the notice required by law.

For purposes of its discussion, the Court organizes its analysis into two separate issues:

1. Whether insufficient mitigation is an essential element for Sixth Amendment purposes.
 2. If insufficient mitigation is an essential element, whether the Notice of Special Sentencing Proceeding provides constitutionally adequate notice.
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1. **Whether insufficient mitigation is an essential element for Sixth Amendment purposes.**
 - a. An element of the offense.

In its order of January 2, 2014, this Court found that the fact of insufficient mitigation is an element of a greater, aggravated offense based on Alleyne’s expanded elements analysis. The Court has also reaffirmed that initial finding. This conclusion is

the first step toward determining whether it is also an essential element that must be charged in the Information.

The State has argued that State v. Siers, 174 Wash.2d 269, 274 P.3d 358 (2012), precludes that result based on that Court's rejection of the analysis in Alleyne's predecessor case, Apprendi v. New Jersey, *supra*. This Court notes, however, that Alleyne's analysis actually supports our own Supreme Court's decision in Siers.

In Siers, the five justice majority held that Apprendi did not require that aggravating factors alleged under RCW 9.94A.537 be pled in the charging document because they were not elements of the crime. Siers at 280-81. The statutory aggravators at issue in Siers, however, merely permitted the sentencing judge to exceed the defendant's own standard range sentence but did not permit a sentence *beyond the statutory maximum for the crime itself*. Siers at 272.

Alleyne would not require a contrary conclusion. Alleyne is concerned only with an aggravating fact which, if found, exposes the defendant to a penalty beyond the penalty authorized for a verdict of guilty of the core crime. Alleyne at 2163. Alleyne holds that the aggravating fact *under those circumstances* becomes a "constituent part of a new offense." *Id.* at 2162. In short, the Siers decision turned on a determination that the statutory aggravators under RCW 9.94A.537 simply were not elements of the crime. Under Alleyne's analysis the Siers-type aggravators still are not elements of a crime, but the fact of insufficient mitigation under RCW 10.95 clearly is.

Simply put, under Alleyne, an aggravating factor that exposes the defendant to a penalty beyond that authorized for commission of the core crime is no longer the "functional equivalent" of an element, it is an element. This latest case in the Apprendi trilogy not only expands the holding of Apprendi, it also clarifies the trilogy's analytical framework. Alleyne provides the formula by which a specific type of aggravating factor

becomes an element of a new crime. This new crime is created when that additional element exposes a defendant to a penalty greater than that authorized upon a verdict of guilty of the core offense.

The State does not address this part of the Alleyne holding, focusing exclusively on the fact that a jury will ultimately make the determination under RCW 10.95.040 in any event. While this assertion may be correct as far as it goes, it does not preclude a determination under Alleyne's expanded analysis that the finding of insufficient mitigation is an element of the separate offense comprised of:

- (1) the core statutory crime of aggravated murder in the first degree for which a sentence of life in prison without release is the prescribed penalty; together with
- (2) the additional element of insufficient mitigation which permits the aggravated penalty of death.

b. An essential element of the offense.

As discussed above, and as this Court has found in its order of January 2, 2014, the fact of insufficient mitigation as it functions in RCW 10.95 is an element of the offense for which death is the prescribed penalty. The State argues, nonetheless, that a distinction remains between an element for purposes of a jury trial and an element for purposes of charging. The Court understands the State's argument as one in support of a functional distinction between an "element" and an essential element. While an essential element must be charged in the charging document, the State contends that this lesser "element" does not.

For purposes of the essential elements rule, an element includes any fact "the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime." State v. Recuenco, 163 Wash.2d 428, 434, 180 P.3d 1276, 1279

(2008). A fact is an essential element of the crime charged when it aggravates the penalty a court may impose. State v. Goodman, 150 Wash.2d 774, 786, 83 P.3d 410, 416 (2004) (a prosecutor must properly identify the alleged controlled substance in the charging document as an essential element of the crime when the controlled substance exposes the defendant to a higher statutory maximum sentence).

Per Alleyne v. U.S., the statutory scheme of RCW 10.95 at issue here establishes two distinct crimes with two corresponding and distinct penalties. To obtain the death penalty, the State must prove the fact of insufficient mitigation as an element of the second, greater and aggravated crime that is comprised of first degree aggravated murder and the additional aggravating element. The fact of insufficient mitigation, therefore, is the finding required to aggravate the penalty a court may impose following a verdict of guilty of first degree aggravated murder. Indeed, that fact is the only element that distinguishes the core crime of first degree aggravated murder for which life in prison without release is the prescribed penalty, from the greater, aggravated crime for which the death penalty is prescribed. It is the sole element which, when found, exposes that defendant to a mandatory sentence of death.

Additionally, the fact of insufficient mitigation is the only element that informs a defendant of which of the two crimes he stands accused: the core crime of first degree aggravated murder, or the aggravated crime for which imposition of the death penalty is required.

Consequently, under the statutory scheme of RCW 10.95, and per Alleyne v. U.S., insufficient mitigation is an essential element of the separate, aggravated crime for which the death penalty is the mandatory punishment.

2. If insufficient mitigation is an essential element, whether the Notice of Special Sentencing Proceeding provides constitutionally adequate notice.

a. Alleyne v. U.S. and the Sixth Amendment

First, on the question of whether the essential element of insufficient mitigation must be charged in the Information, the State maintains that Alleyne is not a charging case and therefore does not stand for the proposition that the element must be pled in the Information. The State argues that Alleyne strengthens its contention that a distinction exists between an element that must be found by a jury under the Sixth Amendment and an element that must be charged in the Information.

The State does not articulate what that distinction is, however, or why it exists, or how it is defined. Nor can the State illustrate that Alleyne itself relies upon such a distinction. Admittedly, Alleyne concerns a defendant's right to a trial by jury on the constituent elements of the statutory offense. Nevertheless, in the absence of any recognition in Alleyne that its initial elements analysis arose from some particular subtype of element that must be found by a jury but need not be charged, that case could be read to disavow any such distinction within the ambit of the Sixth Amendment's protections. This is so because the Sixth Amendment protects both rights: the right to a trial by jury and the right to adequate notice.

Alleyne grounded its preliminary elements analysis broadly in the Sixth Amendment before proceeding to discuss the implications of its conclusion with respect to the narrower right to a trial by jury at issue there. Alleyne at 2162. Significant to the analysis here, the Sixth Amendment not only protects a defendant's right to a trial by jury, but also his right "to be informed of the nature and cause of the accusation." Although the State maintains that there exists a functional distinction between an element for charging purposes and an element for purposes of a right to a jury trial, the scope of Alleyne's elements analysis suggests that if there were such a distinction, it

must exist somewhere else, *outside* the ambit of the Sixth Amendment's constitutional protection. Alleyne, therefore, cannot support the State's argument that a distinction exists for purposes of analyzing a defendant's right to a jury trial and his right to constitutionally adequate notice.

Additionally, to the argument that Alleyne is not directly relevant to the requirements of an essential element in the charging context, our own Supreme Court decisions seem to belie that contention. In a case not cited by any of the parties, our Supreme Court unanimously held that Apprendi was applicable to a defendant's challenge to the sufficiency of a charging document. In State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004), the appellant argued that the Amended Information charging him with possession with intent to deliver "meth" was defective because it failed to adequately identify the controlled substance. Goodman at 780-81. In disapproving the Court of Appeals' conclusion that the State need not allege the specific controlled substance in the Information, the Court stated:

"We disagree with the Court of Appeals as its holding is contrary to United States Supreme Court precedent. When the identity of the controlled substance increases the statutory maximum sentence of which the defendant may face upon conviction [sic], that identity is an essential element of the crime and it must be included in the charging document."

Goodman at 778.

The United States Supreme Court precedent of which the Court of Appeals had run afoul was Apprendi v. New Jersey. Goodman at 785. The unanimous court stated, "It is clear under Apprendi the identity of the controlled substance is an element of the offense when it aggravates the maximum sentence with which the court may sentence a defendant." Id. at 785-86.

The Goodman court emphasized in the following manner its final decision on the charging issue “squarely before us”:

“We conclude under Apprendi the State must allege the specific identity of the controlled substance. Consequently, the reasoning employed by the Court of Appeals is contrary to United States Supreme Court precedent and is hereby disapproved.”

Goodman at 787.

Accordingly, the State’s contention that Apprendi and, by extrapolation, Alleyne are not relevant because they are not charging cases simply is not supported by the case law. See also State v. Powell, 167 Wash.2d 672, 223 P.3d 493 (2009) (overruled on other grounds by State v. Siers, 174 Wash.2d 269, 274 P.3d 358 (2012)).

b. Constitutionally Adequate Notice; RCW 10.95.040

As a result of Alleyne v. U.S. the absence of sufficient mitigating circumstances is an element of the crime for which death is the mandatory punishment. It can no longer be viewed simply as the “functional equivalent” of an element for purposes of determining only a defendant’s right to a trial by jury. Nor can insufficient mitigation be viewed as an element but not an essential element, particularly since, as in Goodman and Recuenco, the additional finding authorizes the aggravated penalty.

Moreover, State v. Goodman clearly controls on the question of whether the fact of insufficient mitigation must be charged in the Information as a result of the U.S. Supreme Court’s analysis under Apprendi and now Alleyne.

The State nonetheless asserts that its notice of special sentencing proceeding pursuant to RCW 10.95.040 serves the same purpose as amending the information and, therefore, amendment is unnecessary. State’s Brief at 13ff. The Court has considered this argument in the context of the novel procedural posture and circumstances that are presented in this case.

On this question, however, the case law in Washington is abundant and consistent. “All essential elements of a crime ... must be included in a charging document in order to afford notice to an accused of the nature and the cause against him.” State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). Essential elements include statutory and non-statutory elements. Kjorsvik at 101-02.

Sentencing enhancements must also be included in the Information. State v. Recuenco, 163 Wn.2d 428, 434, 180 P.2d 1276 (2008). When the term “sentence enhancement” describes an increase beyond the maximum authorized for the statutory offense, that enhancement is the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict and it must be set forth in the information. Recuenco at 434.

Moreover, a legion of appellate cases illustrate that failure to give proper notice could have disastrous consequences, such as dismissal. (See, e.g., State v. Zillyette, 178 Wash.2d 153, 307 P.3d 712 (2013).)

B. Conclusion

Having held that the absence of sufficient mitigation is an essential element, this Court concludes that it must be set forth in the Information. This requirement is no more burdensome than the State’s obligation to set forth sentence enhancers that function in the same fashion.

Accordingly, in the absence of clear authority that constitutionally adequate notice of an essential element can be accomplished through the RCW 10.95.040 notice alone, this Court concludes that notice of the essential element of not sufficient mitigating circumstances must be provided in the charging document, i.e., the Information. The State may elect to amend the Information consistent with this Court’s

ruling on or before February 17, 2014. Should the State choose not to amend by that date, the Court will thereafter entertain a defense motion to accept the Defendant's plea.

Finally, to permit the events outlined above, the Court denies without prejudice Defendant's motion to dismiss the State's Notice of Special Sentencing Proceeding to seek the death penalty against him.

SIGNED this 31st day of January, 2014.

Jeffrey M. Ramsdell
The Honorable JEFFREY M. RAMSDELL